

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3 HONORABLE LARRY ALAN BURNS, JUDGE PRESIDING

4 UNITED STATES OF AMERICA,)
5)
6 PLAINTIFF,) CASE NO. 08CR00416-LAB
7)
8 VS.)
9) SAN DIEGO, CALIFORNIA
FRANCISCO ESPARZA-GUTIERREZ,) MARCH 24, 2008
8) 9:30 A.M.
9 DEFENDANT.)
_____)

10
11 REPORTER'S TRANSCRIPT

12 ACCEPT PLEA WITHOUT P.O. REPORT

13
14 APPEARANCES:

15 FOR THE GOVERNMENT:

KAREN P. HEWITT, U.S. ATTORNEY
BY: MARK CANOVER, ESQ.
ASSISTANT U.S. ATTORNEY
880 FRONT STREET
SAN DIEGO, CA 92101

18 FOR THE DEFENDANT:

FEDERAL DEFENDERS, INC.
BY: DAVID PETERSON, ESQ.
225 BROADWAY, SUITE 900
SAN DIEGO, CA 92101

20 COURT REPORTER:

EVA OEMICK
OFFICIAL COURT REPORTER
UNITED STATES COURTHOUSE
940 FRONT STREET, STE. 2190
SAN DIEGO, CA 92101
TEL: (619) 615-3103

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1 SAN DIEGO, CALIFORNIA - MONDAY, MARCH 24, 2008, 9:30 A.M.

2 THE CLERK: NO. 8, 08CR00416, UNITED STATES OF
3 AMERICA VERSUS FRANCISCO ESPARZA-GUTIERREZ FOR CONTINUANCE.

4 MR. CANOVER: GOOD MORNING, YOUR HONOR. MARK
5 CANOVER ON BEHALF OF THE UNITED STATES.

6 MR. PETERSON: IF I MAY HAVE A MOMENT, YOUR HONOR.
7 MY COLLEAGUE, JIM MC MULLEN, HAS POINTED OUT TO ME THAT A
8 MONTH CONTINUANCE WOULD BE MORE APPROPRIATE THAN A TWO-WEEK
9 CONTINUANCE, BECAUSE I BELIEVE THERE WOULD BE BRIEFING
10 NECESSARY IN THIS CASE.

11 AND IN LIGHT OF THE FACT THAT I AM IN YOUR
12 COURTROOM, YOUR HONOR, ON TWO MOTION HEARINGS, I DON'T THINK
13 I'D BE ABLE TO CARRY OUT THE NECESSARY BRIEFING TODAY.

14 THE COURT: I WILL GIVE YOU A MONTH.

15 MR. PETERSON: THANK YOU.

16 THE COURT: WHAT DO YOU THINK THEY DID TO BREACH THE
17 PLEA AGREEMENT?

18 MR. PETERSON: THE AMENDED SENTENCING SUMMARY CHART
19 SPECIFIES A DIFFERENT TOTAL OFFENSE LEVEL THAN THAT --

20 THE COURT: THAN IT WAS BARGAINED FOR?

21 MR. PETERSON: THAN THE ONE THAT WAS BARGAINED FOR.
22 IT SIGNIFICANTLY ALTERS THE GUIDELINES.

23 THE COURT: WAS IT AN AREA THAT WAS LEFT OPEN,
24 MR. PETERSON, DEPENDING TO A CRIMINAL HISTORY DETERMINATION?

25 MR. PETERSON: NO, YOUR HONOR. THE CRIMINAL HISTORY

1 CATEGORY IS LEFT OPEN UNDER OUR STANDARD FAST TRACK PLEA
2 AGREEMENT, BUT THE TOTAL OFFENSE LEVEL IS NOT LEFT OPEN. THE
3 PARTIES AGREED TO IT AND ARE BOUND BY THEIR CONTRACTUAL
4 AGREEMENT.

5 THE COURT: THIS IS FRANCISCO GUTIERREZ, RIGHT?

6 MR. PETERSON: THAT'S CORRECT. HE IS NOW BEFORE THE
7 COURT AND IN CUSTODY.

8 THE COURT: WELL, LET ME TELL YOU ONE THING THAT HAS
9 NOT HAPPENED YET. THEIR AMENDED SENTENCING SUMMARY CHART
10 HASN'T MADE ITS WAY INTO MY FILE. SO I HAVE NOT CONSIDERED IT
11 AT THIS POINT.

12 MR. PETERSON: IT WAS FILED LATE FRIDAY AFTERNOON.

13 MR. CANOVER: I HAVE A COPY IF YOU WOULD LIKE TO SEE
14 IT, YOUR HONOR.

15 THE COURT: YOU WANT ME TO SEE IT AT THIS POINT, OR
16 YOU WANT ME TO SEAL IT PENDING THE RESOLUTION OF THEIR MOTION?

17 MR. CANOVER: WE CAN WAIT TO THE RESOLUTION OF THE
18 MOTION, YOUR HONOR.

19 THE COURT: YOU MAY LODGE IT.

20 TISH, IF YOU'LL FILE IT SEALED.

21 MR. PETERSON: IT WAS E-FILED ON FRIDAY, YOUR HONOR.

22 THE COURT: I HAVEN'T SEEN IT. WHEN IT COMES IN IN
23 HARD COPY FORM OR WHEN ROSEANNA GIVES IT TO YOU, SEAL IT
24 PENDING RESOLUTION OF THIS. PROBABLY UNCOMPLICATES IT IF I
25 HAVEN'T SEEN IT AT ALL BY THE TIME I RULE ON THE MOTION.

1 YOU PROBABLY REVEAL THE SUBSTANCE OF IT IN THE
2 MOTION, RIGHT?

3 MR. PETERSON: I BELIEVE I HAVE ALREADY REVEALED THE
4 SUBSTANCE OF IT TO YOUR HONOR.

5 THE COURT: WELL, I DON'T KNOW EXACT NUMBERS, BUT DO
6 YOU HAVE ANY OBJECTION TO ME LOOKING AT IT RIGHT NOW?

7 MR. PETERSON: I DON'T HAVE AN OBJECTION TO YOU
8 LOOKING AT IT. IT HAS BEEN FILED WITH THE COURT, AND THE
9 FILING WITH THE COURT WOULD HAVE BEEN THE BREACH THAT I WAS
10 CLAIMING.

11 THE COURT: I HAVEN'T ACTUALLY SEEN IT, BUT I WILL
12 TAKE A LOOK AT IT. I DON'T KNOW THERE IS ANY OTHER WAY. IF
13 YOU ARE MAKING AN ARGUMENT IN CONTEXT, I NEED TO KNOW WHAT THE
14 DIFFERENT RECOMMENDATION IS AND WHY THAT CONSTITUTES A BREACH.

15 THE AMENDED RECOMMENDATION HERE, MR. PETERSON, IS
16 EXACTLY THE SAME BOTTOM LINE. THIS IS IT?

17 MR. CANOVER: THAT'S CORRECT, YOUR HONOR. THE
18 RECOMMENDATION REMAINS THE SAME. THE DIFFERENCE IS THE
19 GOVERNMENT BECAME AWARE OF A PRIOR 1326 THAT OCCURRED ABOUT
20 TWO OR THREE MONTHS PRIOR THAT WE WERE NOT AWARE OF.

21 THE COURT: HOW IS THAT A BASIS FOR BREACH? THEY
22 ARE RECOMMENDING THE SAME BOTTOM LINE SENTENCE, AND YOU TOLD
23 ME THE CRIMINAL HISTORY WAS LEFT OPEN. ALL THEY HAVE DONE IS
24 INDICATED THAT HE HAS GOT A PRIOR THAT THEY DIDN'T KNOW
25 ABOUT.

1 MR. PETERSON: WHAT'S LEFT OPEN IS THE CRIMINAL
2 HISTORY CATEGORY. UNDER THE CLEAR TERMS OF THE PLEA
3 AGREEMENT, THE PARTIES AGREE THAT THE SENTENCING GUIDELINES
4 ARE TO BE COMPUTED AS FOLLOWS: BASE OFFENSE LEVEL EIGHT,
5 MINUS TWO FOR ACCEPTANCE OF RESPONSIBILITY, FOR A TOTAL
6 OFFENSE LEVEL OF SIX.

7 THAT'S THE CLEAR TERMS OF THE PLEA AGREEMENT. AND
8 AS YOU SEE FROM THE SENTENCING SUMMARY CHART THAT THEY FILED
9 ON FRIDAY, THEY ARE NOW SAYING THAT THE TOTAL OFFENSE LEVEL IS
10 10 AFTER REDUCTION OF TWO FOR ACCEPTANCE OF RESPONSIBILITY.

11 THE COURT: I MEAN, LOOK, IT EITHER IS OR IT ISN'T.
12 I AM NOT GOING TO CONTINUE THIS THING FOR A MONTH TO GO OVER
13 IT IF THIS IS THE ISSUE. THEY FOUND A PRIOR THEY WEREN'T
14 AWARE OF. THEY HAVE INCLUDED THE PRIOR IN THE CALCULATIONS.
15 THEIR BOTTOM LINE RECOMMENDATION REMAINS THE SAME.

16 MR. PETERSON, I DON'T HAVE TIME TO WAIT AND CONSIDER
17 WHETHER THIS IS A BREACH IF THOSE ARE THE CIRCUMSTANCES. IN
18 MY JUDGMENT, THAT'S NOT A BREACH. THEY ARE BUFFETED HERE.
19 THEY HAVE AN OBLIGATION TO TELL ME WHAT THE GUIDELINES ARE,
20 NOT WHISTLE PAST THE GRAVEYARD AND IGNORE THINGS THAT ARE
21 EXTANT AS IN THIS CASE, THE PRIOR 1326.

22 THEY HAVE DONE THAT, BUT THEIR BOTTOM LINE
23 RECOMMENDATION REMAINS 60 DAYS. SO WHY IN THE WORLD WOULD I
24 PUT THIS OVER AND SAY SHAME ON YOU FOR TELLING ME THE TRUTH ON
25 SOMETHING YOU WEREN'T AWARE OF AT THE TIME? I DON'T THINK IT

1 WORKS THAT WAY.

2 THE MOTION FOR CONTINUANCE IS DENIED. YOU WANT TIME
3 TO TALK TO YOUR CLIENT, BECAUSE I AM GOING TO GO FORWARD TODAY
4 ON THIS.

5 MR. PETERSON: YOUR HONOR, IN THIS CASE I WOULD SAY
6 CLEARLY THERE IS A BREACH. IF I CAN READ TO YOU FROM THE PLEA
7 AGREEMENT WHICH YOU HAVE BEFORE YOU.

8 THE COURT: I DISAGREE. I HAVE YOUR ARGUMENT. IT'S
9 NOT A BREACH. THEY HAVE AN OBLIGATION TO GIVE ME CORRECT
10 INFORMATION. AND THE EXPLANATION IS THEY WEREN'T AWARE OF THE
11 1326 AT THE TIME THEY NEGOTIATED THE PLEA. THEY FOUND OUT
12 ABOUT IT. THEY PUT IT IN, BUT THEIR BOTTOM LINE REMAINS 60
13 DAYS.

14 MR. PETERSON: YOUR HONOR, THE CRIMINAL HISTORY
15 REPORT PREPARED BY PROBATION CONTAINED THE CALCULATIONS THAT
16 THEY LATER ON SUPPLIED ADDITIONALLY.

17 THE COURT: IT HAPPENS FREQUENTLY, MR. PETERSON.
18 PROBATION UNEARTHED SOMETHING THAT THEY WERE UNAWARE OF.

19 I MEAN, I JUST HAD SOMEBODY COMPLAINING TO ME THAT
20 THEY HAVE 10 DAYS TO MAKE UP THEIR MINDS HERE WHICH MEANS THAT
21 THERE IS SOME PRESSURE ON THE GOVERNMENT TO COME UP WITH THESE
22 OFFERS FAIRLY QUICKLY, TOO. IT IS NOT AT ALL UNCOMMON THAT A
23 PRIOR GETS MISSED, NOT AT ALL. IF YOUR POSITION IS THE
24 SCORCH-EARTH POSITION, WELL, THAT'S IT. YOU MISSED IT AS OF
25 THAT FIRST LOOK. CAN'T EVER BE CONSIDERED EVEN THOUGH THERE

1 IS NO DISPUTE THAT HE HAS SUFFERED A PRIOR IN THE PAST, THAT'S
2 AN UNREASONABLE POSITION THAT I DON'T EMBRACE.

3 MR. PETERSON: THE PLEA AGREEMENT VERY MUCH TAKES
4 INTO CONSIDERATION THE POSSIBILITY THAT SOMETHING WILL BE
5 MISSED, AND THAT ALLOWS THEM TO CHANGE THE CRIMINAL HISTORY
6 CATEGORY CALCULATION, BUT IT DOES NOT ALLOW THEM TO CONTAIN
7 THE CRIMINAL HISTORY BASE OFFENSE LEVEL AND TOTAL OFFENSE
8 LEVEL FOLLOWING AN ADJUSTMENT.

9 THE COURT: WHAT YOU ARE SAYING IS DON'T GIVE EFFECT
10 TO SOMETHING THAT HAS LEGAL EFFECT. IGNORE THAT, BECAUSE THEY
11 MISSED IT. THEY WERE UNAWARE OF IT. THE FACT OF THE MATTER
12 IS THEY FOUND IT. IT HAS SOME LEGAL EFFECT, BUT AT THE END OF
13 THE DAY THEIR SENTENCING RECOMMENDATION IS THE SAME.

14 THE MOTION TO CONTINUE IS DENIED. IF YOU WANT TO GO
15 FORWARD NOW, WE WILL. OTHERWISE I WILL TRAIL TO THE END OF
16 THE CALENDAR. I AM NOT GOING TO TRAIL THIS CASE TO TAKE
17 ARGUMENT ON THAT. I THINK IT IS REALLY AN UNREASONABLE
18 ARGUMENT TO SAY THAT THE GOVERNMENT HAS TO, IN EFFECT, REMAIN
19 OR ADHERE TO SOME FICTION THAT A PRIOR THAT THEY DIDN'T KNOW
20 EXISTS DOESN'T EXIST AND THEY CAN'T SPEAK OF IT. IT'S LIKE
21 THE NAME MOSES, YOUR KNOW. IT WON'T BE WRITTEN. IT'LL BE
22 STRICKEN FROM EVERY OBELISK AND NO ONE WILL SPEAK IT AGAIN.
23 THAT'S JUST NOT THE WAY IT WORKS.

24 THEY HAVE AN OBLIGATION TO BE HONEST WITH ME AND
25 SAY, "JUDGE, WE MISSED IT. HERE IT IS. DOESN'T AFFECT THE

1 BOTTOM LINE. WE ARE SORRY WE MISSED IT. OUR RECOMMENDATION
2 MIGHT HAVE BEEN DIFFERENT, BUT WE MISSED IT. WE ARE GOING TO
3 GO ALONG WITH THE 60-DAY RECOMMENDATION" WHICH, BY THE WAY,
4 MR. PETERSON, I AM NOT ON BOARD WITH. BUT IT HAS NOTHING TO
5 DO WITH THEIR RECOMMENDATION.

6 MR. PETERSON: YOUR HONOR, THE HARMLESS ERROR RULE
7 DOES NOT APPLY TO BREACH OF PLEA AGREEMENTS. SO WHETHER OR
8 NOT THEIR BREACH AFFECTS YOUR ULTIMATE DECISION IS --

9 THE COURT: YOU ARE PRESUMING IT'S A BREACH, AND I
10 REJECT IT. THAT'S NOT A BREACH.

11 ANYWAY, YOUR CHOICES ARE THESE: YOU WANT TO GO
12 FORWARD NOW OR YOU WANT TO GO FORWARD AT THE END OF THE
13 CALENDAR?

14 I DENY THE MOTION TO POSTPONE FOR YOU TO BRIEF
15 WHETHER THIS IS A BREACH. I FIND IT IS NOT. IF THREE WISER
16 PEOPLE ON A HIGHER COURT DISAGREE WITH ME, THEN YOU HAVE GOT
17 AN APPEAL.

18 YOU WANT TO GO FORWARD NOW OR YOU WANT ME TO TRAIL
19 YOU ON THE CALENDAR?

20 MR. PETERSON: IF YOUR HONOR WOULD TRAIL TO THE END
21 OF THE CALENDAR, PLEASE.

22 THE COURT: WE WILL RECALL THIS AGAIN.

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1 SAN DIEGO, CALIFORNIA - MONDAY, MARCH 24, 2008, 2:00 P.M.

2 THE CLERK: NO. 8, 08CR00416, UNITED STATES OF
3 AMERICA VERSUS FRANCISCO ESPARZA-GUTIERREZ.

4 MR. PETERSON: GOOD AFTERNOON, YOUR HONOR. DAVID
5 PETERSON ON BEHALF OF MR. ESPARZA-GUTIERREZ.

6 MR. CANOVER: GOOD AFTERNOON, YOUR HONOR. MARK
7 CANOVER ON BEHALF OF THE UNITED STATES.

8 MR. PETERSON: MR. ESPARZA-GUTIERREZ IS PRESENT
9 BEFORE THE COURT. HE IS IN CUSTODY. HE WILL BE USING A
10 SPANISH-SPEAKING INTERPRETER TODAY. WE ARE PREPARED TO GO
11 FORWARD.

12 THE COURT: THE COURT HAS RECEIVED A REPORT AND
13 RECOMMENDATION FROM JUDGE ADLER WHO TOOK THIS GENTLEMAN'S PLEA
14 TO BEING A DEPORTED ALIEN FOUND IN THE UNITED STATES. JUDGE
15 ADLER SAYS THE PLEA WAS OFFERED FREELY, VOLUNTARILY, KNOWINGLY
16 AND INTELLIGENTLY AND URGES ME ACCEPT IT. I AM PREPARED TO DO
17 THAT UNLESS THERE IS AN OBJECTION AT THIS TIME?

18 MR. PETERSON: NO OBJECTION AT THIS TIME, YOUR
19 HONOR.

20 THE COURT: I ADOPT THE REPORT AND RECOMMENDATION.
21 I FIND THAT THE PLEA WAS KNOWING, VOLUNTARY AND INTELLIGENT.
22 I ACCEPT IT.

23 THIS GENTLEMAN, MR. ESPARZA, AT ONE POINT WAIVED HIS
24 RIGHT TO A PRESENTENCE REPORT. DOES HE CONFIRM THAT DECISION
25 TODAY?

1 MR. PETERSON: HE DOES, YOUR HONOR.

2 THE COURT: IF LIEU OF THAT, I HAVE BEEN FURNISHED
3 WITH A CRIMINAL HISTORY REPORT WHICH I HAVE READ AND
4 CONSIDERED. I HAVE ALSO LOOKED AT THE PLEA AGREEMENT IN THIS
5 CASE, MR. PETERSON. AND THE GOVERNMENT, AS YOU HAVE NOTED,
6 HAS FILED AN INITIAL SENTENCING SUMMARY CHART AND RAP SHEET,
7 AND THEN THEY FILED AN AMENDED ONE THAT MAKES REFERENCE TO THE
8 PRIOR ILLEGAL REENTRY. THAT'S THE ONE THAT WAS NOT KNOWN?

9 MR. PETERSON: THAT'S CORRECT.

10 THE COURT: JUST A SINGLE REENTRY?

11 MR. PETERSON: THAT'S CORRECT.

12 THE COURT: AND THE RECORD WILL REFLECT THAT YOU HAD
13 MOVED FOR A CONTINUANCE SO THAT YOU COULD ARGUE THAT THIS WAS
14 A BREACH OF THE GOVERNMENT'S PLEA AGREEMENT TO FILE THE
15 AMENDED RAP SHEET AND SENTENCING SUMMARY CHART.

16 I HAVE OVERRULED THAT. THEY ARE ASKING FOR THE SAME
17 SENTENCE IN BOTH. THE ONLY THING THAT'S DIFFERENT FROM MY
18 PROSPECTIVE IS THAT THEY CHANGED THE GUIDELINE CALCULATIONS.
19 AND THEY HAVE BEEN FORCED TO DO THAT, BECAUSE IT APPEARS TO BE
20 UNDISPUTED THAT THEY WERE UNAWARE AT THE TIME THEY ENTERED
21 INTO THE PLEA AGREEMENT WITH THE DEFENDANT THAT HE HAD A
22 PRIOR. THEY SUBSEQUENTLY BECAME AWARE OF IT, AND OBSERVATION
23 OF THEIR DUTY OF CANDOR TO THE COURT AND HELPING ME TO GET THE
24 GUIDELINES CALCULATIONS RIGHT, THEY HAVE ALERTED ME TO THAT.

25 SO THEIR GUIDELINE CALCULATIONS APPEAR TO BE

1 CORRECT. EVEN THOUGH THE GUIDELINES WOULD COMMAND A LONGER
2 SENTENCE THAN THEY RECOMMEND, THEY HAVE ADHERED TO THEIR
3 ORIGINAL SENTENCING POSITION WHICH, FROM THE DEFENDANT'S
4 PROSPECTIVE, IS REALLY THE BOTTOM LINE. HOW MUCH TIME HE
5 DOES, NOT HOW WE GET THERE.

6 FOR THOSE REASONS I OVERRULE THE OBJECTION. I DENY
7 THE REQUEST FOR CONTINUANCE TO BRIEF THAT. I DON'T NEED ANY
8 FURTHER BRIEFING ON THAT. HE HAS HIS ISSUE, IF HE WANTS IT,
9 FOR THE COURT OF APPEALS. ALTHOUGH WAS THERE AN APPELLATE
10 WAIVER AS PART OF THE PLEA AGREEMENT?

11 MR. CANOVER: YES, THERE IS, YOUR HONOR.

12 THE COURT: WELL, I HAVE A DISAGREEMENT EVEN WITH
13 THE RECOMMENDATION OF 60 DAYS GIVEN THAT THIS IS NOT HIS
14 FIRSTTIME. I AM AWARE OF THAT. I AM NOT INCLINED TO GO ALONG
15 WITH THE 60-DAY RECOMMENDATION. HE GOT THAT THE FIRST TIME.
16 I AM HAPPY TO HEAR FROM YOU AS TO WHAT MIGHT BE AN ALTERNATIVE
17 APPROPRIATE SENTENCE.

18 MR. PETERSON: THANK YOU, YOUR HONOR.

19 GOVERNMENT AND DEFENSE COUNSEL STAND BY THEIR
20 RECOMMENDATION OF 60 DAYS WHICH IS PER THE PLEA AGREEMENT. IN
21 ADDITION, I WOULD NOTE THAT THE PLEA AGREEMENT DOES CONTAIN A
22 VALVE FOR THE GOVERNMENT IF SOMETHING LIKE THIS IS TO HAPPEN
23 AND THE TOTAL OFFENSE LEVEL REMAINS THE SAME -- SIX -- AND THE
24 CRIMINAL HISTORY CATEGORY IS AMENDED TO REFLECT THE CHANGE.
25 THAT WOULD BE A MOVEMENT FROM CRIMINAL HISTORY CATEGORY 1 TO

1 CRIMINAL HISTORY CATEGORY 3.

2 THE GUIDELINE RANGE THERE UNDER THE PLEA AGREEMENT
3 WOULD BE TWO TO EIGHT MONTHS. AND, IN ESSENCE, THEN WITH THE
4 GOVERNMENT BY CONTINUING ITS RECOMMENDATION OF 60 DAYS IS
5 RECOMMENDING THE LOW END OF THE AMENDED GUIDELINE RANGE AGREED
6 TO BY THE PARTIES UNDER THE PLEA AGREEMENT.

7 THE COURT: THEY SAY THAT THE RANGE -- AND I
8 UNDERSTAND THERE IS A DIFFERENCE BETWEEN WHAT THE RANGE IS AND
9 THE RECOMMENDATION. THE RANGE IS 10 TO 16 MONTHS.

10 MR. PETERSON: YOUR HONOR, AND THAT'S WHEN I BELIEVE
11 THE BREACH OCCURRED. CLEARLY, IN THE PLEA AGREEMENT IT SAYS
12 THE PARTIES AGREE THAT U.S. 201.2 APPLIES IN THIS CASE AND THE
13 SENTENCING GUIDELINES ARE TO BE COMPUTED AS FOLLOWS: BASE
14 OFFENSE LEVEL 8 -- I AM READING FROM PARAGRAPH 5.

15 ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY UNDER
16 3(E)1.1 DOWN TWO LEVELS FOR A TOTAL OFFENSE LEVEL OF 6. AND
17 THEN MOVING ON TO THE PARAGRAPH A WHICH HAS NO AGREEMENT AS TO
18 CRIMINAL HISTORY CATEGORY.

19 WHAT IT SAYS IS THAT "THE PARTIES AGREE FURTHER IF
20 IN THE EVENT CONTRARY OTHER ADDITIONAL INFORMATION IS
21 DISCOVERED CONCERNING DEFENDANT'S CRIMINAL HISTORY WHICH
22 CHANGES DEFENDANT'S CRIMINAL HISTORY CATEGORY BEFORE DEFENDANT
23 IS SENTENCED, THEN THE COURT MAY SENTENCE DEFENDANT BASED ON
24 THE AGREED TOTAL OFFENSE LEVEL OF SIX AT THE NEW CRIMINAL
25 HISTORY CATEGORY OR THE GOVERNMENT MAY MOVE TO WITHDRAW FROM

1 THE PLEA AGREEMENT. "

2 THE GOVERNMENT IS NOT, TO MY UNDERSTANDING,
3 WITHDRAWING.

4 THE COURT: OR, I SUPPOSE, THE DEFENDANT HAS A RIGHT
5 THE WITHDRAW, TOO. I DIDN'T GIVE YOU THAT OPPORTUNITY. IF HE
6 WANTS TO DO THAT BASED ON MY STATEMENTS AND THE DISCOVERY OF
7 HIS PRIOR THAT WAS HERETOFORE UNKNOWN, I WOULD PERMIT HIM TO
8 DO THAT. I JUST DON'T SEE HOW IT BETTERS THE SITUATION, BUT
9 YOU ARE IN THE BEST POSITION TO ADVISE HIM ON THAT.

10 MR. PETERSON: I HAVE SPOKEN WITH HIM ABOUT THAT,
11 AND I APPRECIATE YOUR HONOR ALLOWING ME TO DO THAT OVER LUNCH.
12 HE DOES NOT WANT TO. AND ONE OF THE REASONS HE DOESN'T WANT
13 TO IS HE ACCEPTED RESPONSIBILITY. IT'S BEEN I THINK A TOUGH
14 COUPLE OF MONTHS, AND I THINK IT HAS BEEN A LITTLE WHILE
15 COMING HERE THAT HE HAS REALIZED IT DOESN'T -- THAT HE DOESN'T
16 GET 60 DAYS A SECOND TIME, THAT THAT'S NOT THE WAY YOU WORK.
17 THAT'S NOT THE WAY, AS YOU HAVE NOTED EARLIER TODAY, HOW THE
18 SYSTEM WORKS.

19 THE COURT: IT SHOULDN'T AT LEAST.

20 MR. PETERSON: AND YOU MIGHT VERY WELL BE CORRECT
21 THAT IT SHOULDN'T. I DO THINK THAT THE 3553(A) FACTORS, WHICH
22 I WILL GO THROUGH, SUGGEST THAT AN INCREASE OF FIVEFOLD UP TO
23 10 MONTHS OR AN INCREASE EIGHTFOLD UP TO 16 MONTHS WOULD BE
24 EXCESSIVE.

25 THE COURT: I AGREE WITH YOU ON THE 16 MONTHS. HE

1 IS NOT A CANDIDATE FOR THAT. I THINK SOME INCREMENTAL
2 INCREASE IS WARRANTED GIVEN THAT HE HAS DONE THIS BEFORE. HE
3 STOOD IN FRONT OF A DISTRICT COURT JUDGE BEFORE.

4 MR. PETERSON: IT WAS HERE.

5 THE COURT: WHICH JUDGE WAS IT?

6 MR. PETERSON: IT MUST HAVE BEEN JUDGE BENITEZ.

7 THE COURT: SO IN NOVEMBER JUDGE BENITEZ SAID "60
8 DAYS. DON'T COME BACK." WHAT IS THE DATE OF THE OFFENSE
9 HERE? JANUARY. HE IS BACK BY JANUARY. SO FROM MY
10 PROSPECTIVE, THAT'S A LITTLE AGGRAVATING.

11 MR. PETERSON: I UNDERSTAND THAT IT WOULD APPEAR TO
12 BE AGGRAVATING. ESSENTIALLY, WHAT KEEPS THAT FROM BEING
13 AGGRAVATING, YOUR HONOR, IN MY OPINION IS THE REASONS THAT
14 MR. ESPARZA HAD FOR COMING BACK. THE SOLE REASON IS BECAUSE
15 HE IS TRYING TO SUPPORT HIS FAMILY.

16 HE IS THE HUSBAND OF JESENIA (PHONETIC), AND
17 TOGETHER THEY HAVE TWO CHILDREN. ONE IS EIGHT AND ONE IS
18 FOUR. AND JESENIA IS IN FACT CURRENTLY SIX MONTHS PREGNANT
19 WITH THEIR THIRD CHILD. THEY DON'T KNOW WHETHER IT'S A BOY OR
20 A GIRL.

21 THE COURT: YOU MUST HAVE DISCUSSED THIS WITH HIM,
22 MR. PETERSON. THERE IS MILLIONS OF MEXICAN CITIZENS WHO GO
23 ABOUT THEIR DAILY ACTIVITIES JUST AS AMERICAN CITIZENS DO, AND
24 THEY DON'T FIND THE NEED TO ILLEGALLY CROSS OVER TO THIS
25 COUNTRY.

1 I GET IT. I AM NOT NAIVE. I UNDERSTAND THE
2 STANDARD OF LIVING IS BETTER HERE THAN IN MANY COUNTRIES, BUT
3 THAT'S NOT A FREE PASS FOR PEOPLE FROM COUNTRIES THAT ARE LESS
4 FORTUNATE JUST TO COME IT. I THINK PROBABLY THAT'S WHAT JUDGE
5 BENITEZ WAS TRYING THE IMPRESS UPON MR. ESPARZA WHEN HE
6 SENTENCED HIM THE FIRST TIME AND SAID, "DON'T COME BACK HERE
7 AGAIN, BECAUSE YOUR WORST DAY IN MEXICO IS BETTER THAN YOUR
8 BEST DAY IN THE UNITED STATES JAIL." THAT'S GOT TO BE TRUE,
9 RIGHT?

10 MR. PETERSON: I THINK THAT THAT IS TRUE, AND I THAT
11 MR. ESPARZA KNOWS THAT. MR. ESPARZA REALIZES THAT. I THINK
12 PARTICULARLY UPON THE REALIZATION THAT IT IS A HASH REALITY
13 THAT IT'S MORE THAN TWO MONTHS IN JAIL THAT ONE IS RISKING IF
14 ONE WERE TO LOOK AT IT FROM A COST BENEFIT ANALYSIS.

15 NOW THAT HE REALIZES THAT IT'S WAY MORE THAN TWO
16 MONTHS WHAT SOME WOULD CONSIDER SLAP ON THE WRIST -- I AM NOT
17 SUGGESTING THAT THAT TWO MONTHS WAS EASY FOR HIM, BECAUSE HE
18 HAS NO PRIOR CRIMINAL HISTORY, NO TIME IN JAIL.

19 THE COURT: HE IS DEFINITELY DIFFERENT FROM THE
20 USUAL OFFENDER THAT I SEE CHARGED UNDER THIS STATUTE. THE
21 OBJECT IS TO KEEP HIM FROM COMING BACK, AND REALLY, WHAT YOU
22 ARE SAYING TO ME IS, "JUDGE, YOU KNOW, I KNOW YOU ARE
23 SPECIFICALLY ASKING FOR THIS, BUT THE EFFECT OF IT IS, JUDGE,
24 YOU NEED TO IMPOSE A SENTENCE THAT GETS THAT MESSAGE HOME TO
25 HIM." APPARENTLY, THE 60 DAYS DIDN'T WORK. 60 DAYS WAS A

1 SMALL PRICE TO PAY. AND APPARENTLY, IF THAT'S ALL THAT
2 HAPPENS TO HIM, HE KEEPS COMING BACK.

3 I HAVE GOT TO CONVINCE MR. ESPARAZA THAT THE PRICE
4 KEEPS GOING UP, THE ANTE GOES UP WHEN HE LOOSES THESE HANDS AS
5 HE DOES WHEN HE GETS ARRESTED COMING ACROSS.

6 MR. ESPARZA, WHAT DO YOU HAVE TO SAY IN YOUR OWN
7 BEHALF?

8 THE DEFENDANT: YOUR HONOR, WHAT I WOULD REQUEST IS
9 ANOTHER OPPORTUNITY PROMISING THAT I WON'T RETURN ANYMORE.

10 THE COURT: YOU MEAN THAT?

11 THE DEFENDANT: YES, I DO MEAN IT.

12 THE COURT: THERE IS NO CIRCUMSTANCE THAT ALLOWS YOU
13 TO COME OVER HERE. I DON'T WANT TO SOUND HEARTLESS TO YOU. I
14 UNDERSTAND WHAT MR. PETERSON SAID. I UNDERSTAND YOU HAVE TWO
15 CHILDREN YOU ARE TRYING TO SUPPORT. YOU HAVE GOT A THIRD
16 CHILD ON THE WAY AND THAT THE OPPORTUNITIES HERE ARE BETTER IN
17 THE UNITED STATES.

18 I HAVE LOOKED AT YOUR RECORD. YOU ARE NOT THE
19 RUN-OF-THE-MILL CRIMINAL. YOU HAVEN'T VIOLATED OTHER LAWS OF
20 THE UNITED STATES, BUT YOU DON'T HAVE A RIGHT TO BE HERE. AND
21 EVERY TIME TO COME BACK, THE JUDGE IS GOING TO BE INCLINED TO
22 GIVE YOU A LONGER SENTENCE. SO YOU HAVE GOT TO STAY IN
23 MEXICO. YOU'LL PROMISE ME THAT YOU'LL DO THAT?

24 THE DEFENDANT: YES, I AM GOING TO DO THAT.

25 THE COURT: WHAT'S THE POSITION OF THE UNITED

1 STATES, 60 DAYS?

2 MR. CANOVER: YES, YOUR HONOR.

3 THE COURT: THE COURT FINDS AS FOLLOWS: FIRST,
4 AGAIN OVER THE OBJECTION OF THE DEFENSE, I FIND THAT THE
5 GUIDELINE LEVELS ARE CORRECTLY SET FORTH IN THE GOVERNMENT'S
6 AMENDED SENTENCING SUMMARY CHART.

7 LOOK, HERE IS WHAT'S NOT AT ISSUE HERE. THEY DIDN'T
8 KNOW ABOUT THIS PRIOR WHEN THEY ENTERED INTO THE PLEA
9 AGREEMENT. I THINK, MR. CANOVER, MR. PETERSON HAS GOT A
10 POINT. YOU NEED TO CHANGE THE STANDARD FORM PLEA AGREEMENT.
11 THE CHANGE IN CRIMINAL HISTORY ALSO MIGHT AFFECT THE
12 GUIDELINES, AND I THINK YOU NEED TO LEAVE YOURSELF THAT OUT.

13 HERE IT ADDS FOUR POINTS. SO YOU ARE IN A POSITION
14 OF EITHER SAYING, "JUDGE, IGNORE THAT RELEVANT PROVISION OF
15 THE GUIDELINES THAT OUGHT TO APPLY BECAUSE YOU PROMISED THAT"
16 OR COMPLYING WITH YOUR DUTY OF CANDOR TO SAY YOU DIDN'T SEE
17 IT, BUT THIS IS THE WAY THE GUIDELINES SHOULD CALCULATE OUT.

18 MR. CANOVER: I AGREE, YOUR HONOR. I BROUGHT THAT
19 UP. WE ARE WORKING ON THAT.

20 THE COURT: THAT NOTWITHSTANDING, THE BOTTOM LINE IS
21 NOT ABOUT CALCULATIONS. IT'S NOT HOW WE GET TO THE
22 RECOMMENDATION OF THE UNITED STATES. IT IS WHAT IT IS. IT
23 DIDN'T CHANGE. IT WAS 60 DAYS BEFORE. IS IT 60 DAYS AGAIN.

24 AGAIN, I REITERATE I FIND NO BREACH ON THE PART OF
25 THE UNITED STATES IN BRINGING TO MY ATTENTION THAT EVERYONE

1 AGREEES EXISTS, AND I DON'T HEAR ANY DISAGREEMENT THAT IT
2 AFFECTS THE CHANGE IN THE GUIDELINE RANGE THAT IS INDICATED IN
3 THE AMENDED SENTENCING SUMMARY CHART. IT DOES HAVE THAT
4 EFFECT. IT ADDS FOUR.

5 MR. PETERSON: IT'S JUST PART OF MY DUTY TO
6 ZEALOUSLY REPRESENT. I WOULD HAVE TO NOTE THAT THE GOVERNMENT
7 HAS NOT PROVIDED THE INFORMATION THAT A DEPORTATION OCCURRED
8 AFTER THAT CONVICTION. THERE IS NO EVIDENCE ON THAT BEFORE
9 THE COURT. I HAVE TO ACKNOWLEDGE THAT, FOR THE RECORD.

10 THE COURT: WELL, THE OFFENSE ITSELF ASSUMES THE
11 DEPORTATION, RIGHT?

12 MR. PETERSON: THE DEPORTATION ADMITTED TO -- AND
13 CHARGING THE INFORMATION ADMITTED TO IN THE PLEA AGREEMENT IS
14 FROM AUGUST 20, 2007 -- EXCUSE ME -- AUGUST 12, I BELIEVE.

15 THE COURT: 13?

16 MR. PETERSON: 20.

17 THE COURT: WHATEVER IT IS. HE HAS PLED GUILTY
18 PREVIOUSLY TO A DEPORTED ALIEN FOUND IN THE UNITED STATES.
19 AND PART OF THE ELEMENT OF THAT CHARGE IS THAT HE HAS A PRIOR
20 DEPORTATION, AND HE HAS CONCLUSIVELY ADMITTED THAT BY HIS
21 GUILTY PLEA. SO I AM NOT SURE I UNDERSTAND THE ARGUMENT
22 ABOUT --

23 MR. PETERSON: UNDER 201.2 FOR THE FOUR-LEVEL
24 ENHANCEMENT, THE DEPORTATION HAS TO OCCUR AFTER THE
25 CONVICTION, AND THE DEPORTATION THAT THE GOVERNMENT HAS

1 PROVIDED EVIDENCE OF IS FROM BEFORE THE CONVICTION.

2 THE COURT: ON THE PRIOR OFFENSE?

3 MR. PETERSON: ON THIS CURRENT.

4 THE COURT: THAT'S BECAUSE THEY DIDN'T KNOW ABOUT
5 THIS ONE, RIGHT?

6 MR. CANOVER: I THINK DEFENSE COUNSEL MAY BE
7 ALLUDING TO THE FACT THAT WE HAVE NOT YET RECEIVED THE
8 DEPORTATION DOCUMENTS ON THE CONVICTION THAT WE WERE UNAWARE
9 OF AND PROVIDED THEM TO DEFENSE COUNSEL. OF COURSE, WE HAVE
10 NOT PROVIDED THOSE TO THE COURT.

11 THE COURT: WELL, I NOTE THAT POINT. NONETHELESS, I
12 FIND THAT THE ADJUSTED OFFENSE LEVEL UPWARD IS 12.

13 MR. ESPARZA HAS ACCEPTED RESPONSIBILITY. SO I DEDUCT TWO
14 POINTS FOR THAT. THAT TAKES IT TO A 10. HE IS IN CRIMINAL
15 HISTORY CATEGORY 3. THERE IS AN ARGUMENT, I SUPPOSE, THAT
16 THAT'S OVER-REPRESENTED. BUT I WOULD REJECT THAT ARGUMENT IN
17 THIS CASE. THE GUIDELINES ARE CORRECTLY CALCULATED.

18 IN PARTICULAR, HIS CRIMINAL HISTORY IS CORRECTLY
19 CALCULATED, AND WHAT WOULD CAUSE ME TO LEAVE HIM AT A THREE,
20 EVEN THOUGH THAT MAY BE HARSH FOR A GUY WITH NO OTHER
21 CRIMINALITY OTHER THAN COMING INTO THE UNITED STATES A COUPLE
22 OF TIMES.

23 AS I SAID, IN NOVEMBER HE IS GIVEN A SWEETHEART DEAL
24 AND HE IS BACK ALREADY IN JANUARY. MOST OF THE TIME I DON'T
25 LIKE THE DOUBLE-WHAMMY EFFECT. HE COMMITTED IT WITHIN A YEAR

1 AND HE IS STILL ON SUPERVISED RELEASE. SO THAT ADDS
2 EXPONENTIALLY TO THE POINTS.

3 BUT IN THIS CASE I DIDN'T THINK THAT THE GUIDELINES
4 HAVE WORKED CORRECTLY AND PUT HIM IN CRIMINAL HISTORY CATEGORY
5 3. I DON'T KNOW BECAUSE I DON'T HAVE A FULL PROBATION REPORT,
6 BUT I AM ASSUMING THAT THERE IS A DEPORTATION HISTORY ANYWAY
7 THAT LEAD TO THIS FIRST CHARGING THIS FELLOW.

8 MR. PETERSON: THAT IS THE AUGUST 20TH DEPORTATION.

9 THE COURT: NOT MORE THAN THAT? HE HASN'T BEEN
10 CAUGHT A BUNCH OF TIMES?

11 MR. PETERSON: I BELIEVER THERE ARE A NUMBER OF
12 RETURNS.

13 THE COURT: SO THE POINT IS, MR. ESPARZA CAN'T COME
14 BACK INTO THE UNITED STATES. THE BORDER PATROL HAS TOLD HIM
15 THAT AND TWO JUDGES HAVE NOW TOLD HIM THAT. I AM GOING TO
16 HOLD YOU TO YOUR PROMISE THAT YOU MADE TO ME THAT YOU ARE NOT
17 COMING BACK.

18 I HAVE LOOKED AT THIS UNDER 3553(A). THIS IS AT THE
19 BENIGN END OF THE 3553(A) SPECTRUM THAT I SEE BECAUSE OF
20 THE LACK OF SUBSTANTIVE CRIMINAL RECORD BEYOND THE IMMIGRATION
21 OFFENSES.

22 I ACCEPT HIS STATEMENT THAT HIS MOTIVE WAS TO COME
23 HERE TO WORK AND NOT TO CAUSE OTHER TROUBLE, BUT HE DOESN'T
24 GET TO DO THAT. AMONG THE 3553(A) FACTORS THAT I THINK ARE
25 PARAMOUNT IN THIS CASE IS FOR DETERRENCE. I NEED TO FASHION A

1 SENTENCE THAT WILL UNDERSCORE WHAT I HAVE SAID TODAY THAT
2 MR. ESPARZA CAN'T COME BACK.

3 THE COURT FINDS ON BALANCE THE MOST REASONABLE
4 SENTENCE IS PROBATION. I PLACE MR. ESPARZA ON PROBATION FOR A
5 PERIOD OF FIVE YEARS. FIRST CONDITION OF PROBATION IS THAT HE
6 SERVE NINE MONTHS IN CUSTODY.

7 SECOND, THAT HE VIOLATE NO LAWS OF THE UNITED STATES
8 DURING THE NEXT FIVE YEARS; AND THIRD, THAT HE NOT COME BACK.
9 PERIOD. IF HE COMES BACK, HE FACES A MUCH LONGER SENTENCE ON
10 A NEW OFFENSE PLUS A PROBATION VIOLATION FROM ME.

11 THE PROBATIONARY SENTENCE WITH THE CONDITION -- THE
12 FIRST CONDITION BEING NOT A JAIL SENTENCE HERETOFORE HAS BEEN
13 THOUGHT TO BE NOT AUTHORIZED, BUT THE COURT HAS CHECKED WITH
14 PROBATION CONCERNING AN ISSUE THAT WAS RAISED LAST WEEK ABOUT
15 WHETHER A CUSTODIAL TERM AS A CONDITION OF PROBATION WAS
16 APPROPRIATE. PROBATION HAS LOOKED AT THE SECTION. REMIND ME
17 AGAIN, MR. PROBATION OFFICER.

18 THE PROBATION OFFICER: 18 U.S.C. 3563(B)10.

19 THE COURT: 18 U.S.C. 3563(B)10, MR. PETERSON.
20 THAT'S THE SECTION I AM RELYING ON.

21 3563(B)10 PROVIDES THAT "AS A CONDITION OF
22 PROBATION, THE COURT MAY ORDER THE DEFENDANT TO REMAIN IN THE
23 CUSTODY OF THE BUREAU OF PRISONS DURING NIGHTS, WEEKENDS, OR
24 OTHER INTERVALS OF TIME TOTALING NO MORE THAN THE LESSER ONE
25 YEAR FOR THE TERM OF IMPRISONMENT AUTHORIZED FOR THE OFFENSE

1 DURING THE FIRST YEAR OF THE TERM OF PROBATION."

2 SO I FIND THAT I DO HAVE AUTHORITY TO IMPOSE A
3 NINE-MONTHS SENTENCE PURSUANT TO THAT AS THE FIRST CONDITION
4 OF PROBATION.

5 SO YOU UNDERSTAND THE CONDITIONS OF PROBATION THAT I
6 HAVE JUST SET?

7 THE DEFENDANT: YES.

8 THE COURT: HE WILL, OF COURSE, GET CREDIT FOR ANY
9 TIME HE SPENT IN CUSTODY AWAITING THE DISPOSITION OF HIS CASE.
10 HOW LONG HAS HE BEEN IN ON THIS CASE?

11 MR. PETERSON: 63 DAYS, A LITTLE OVER TWO MONTHS.

12 THE COURT: SO THAT WILL CUT AGAINST IT.

13 MR. PETERSON: YOUR HONOR, I WOULD NOTE THAT SINCE
14 THE CHARGE IN THE INFORMATION CARRIES A MAXIMUM OF TWO YEARS
15 IMPRISONMENT, I THINK TWO YEARS OF PROBATION WOULD BE THE
16 MAXIMUM THAT YOU'D BE AUTHORIZED TO GIVE.

17 THE COURT: NO. SOMEBODY CHECKED ON THAT. EVEN ON
18 A MISDEMEANOR IT IS UP TO FIVE YEARS. MS. DIORIO DID THE
19 RESEARCH ON THAT. AND I CAN'T GIVE YOU THE SECTION. OF
20 COURSE, I CORRECT THE JUDGMENT IF I AM IN ERROR ON THAT. I
21 THINK IT'S UP TO FIVE YEARS. SO I DO IMPOSE FIVE YEARS
22 PROBATION ON THOSE CONDITIONS.

23 NOW, THAT EXCEEDS THE 60 DAYS. THAT TRIGGERS HIS
24 RIGHT TO APPEAL.

25 MR. ESPARZA, YOU HAVE A RIGHT TO APPEAL THE JUDGMENT

1 AND SENTENCE I JUST PRONOUNCED. YOUR NOTICE OF APPEAL HAS TO
2 BE FILED WITH THE NEXT 10 DAYS IN THIS COURT. MR. PETERSON
3 WILL HELP YOU IF YOU CHOOSE TO APPEAL OR THE CLERK OF THE
4 COURT WILL. BECAUSE YOU ARE INDIGENT, YOU HAVE A RIGHT TO
5 FILE A FREE APPEAL.

6 DO YOU UNDERSTAND YOUR RIGHT TO APPEAL?

7 THE DEFENDANT: YES.

8 THE COURT: THE COURT DECLINES TO IMPOSE A FINE.
9 MR. CANOVER, THIS IS A CASE WHERE I THINK HE'LL NEED WHATEVER
10 MONEY HE HAS ON THE BOOKS TO GET BACK TO MEXICO. IF YOU MOVE
11 TO REMIT THE PENALTY ASSESSMENT, I WILL GRANT THAT MOTION.

12 MR. CANOVER: SO MOVED, YOUR HONOR.

13 THE COURT: PENALTY ASSESSMENT IS REMITTED.

14 GOOD LUCK. MR. ESPARZA, DON'T COME BACK. THE
15 SENTENCE IS NECESSARILY GOING TO BE MORE NEXT TIME.

16 THE DEFENDANT: THANK YOU.

17 MR. PETERSON: THANK YOU, YOUR HONOR.

18 --000--

19
20 I HEREBY CERTIFY THAT THE TESTIMONY
21 ADDUCED IN THE FOREGOING MATTER IS
22 A TRUE RECORD OF SAID PROCEEDINGS.

23 S/EVA OEMICK 4-8-08

24 EVA OEMICK DATE
25 OFFICIAL COURT REPORTER